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No. 95-809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,

v.

PAUL L. SPINK,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons is a nonprofit membership organization of approximately 34 million persons age 50 and older. One of AARP's primary objectives is to promote the economic security of individuals as they age. Through educational and advocacy efforts, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension plans.

Since 1985, as part of its advocacy efforts, AARP has filed numerous briefs in the federal district and appellate courts and in the U.S. Supreme Court on behalf of older workers and retirees concerning employment and benefits under the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act (ERISA). In this Court, AARP

has participated as *amicus curiae* in, among others, the cases of *Varity Corp. v. Howe*, 1996 U.S. LEXIS 1954 (March 19, 1996), and *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517 (1993). AARP has also directly litigated lawsuits challenging tne age-based denial of pension contributions and accruals. *AARP v. Farmers Group*, 700 F. Supp. 1052 (C.D Cal. 1988), *aff'd*, 943 F.2d 996 (9th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992); *AARP v. EEOC*, 655 F. Supp 228 (D.D.C.), *rev'd in part*, 823 F.2d 600 (D.C. Cir. 1987).

Employers have offered early retirement incentive programs to many of AARP's 14 million actively employed members. As a condition of participation in some programs, employees are required to sign releases of employment claims against their employer. AARP's concern is that the consideration for such releases is paid with employer, not pension, funds. Also of concern to AARP is whether employers are using age to reduce pension benefit accruals, and therefore the amount of the pensions received by employees.

These AARP members, as well as other older Americans, who depend on private employer-sponsored pension plans for their economic security, have a significant interest in the affirmance of the decision below, which protects the amount and security of their pension benefits. In light of the significance of these issues to AARP and its members, AARP respectfully submits this brief *amicus curiae*.

SUMMARY OF ARGUMENT

This case presents two distinct claims. First, whether Lockheed violated ERISA's prohibited transaction rule by using plan assets to purchase releases from employees of all employment claims against Lockheed in exchange for enhanced pension benefits. Second, whether OBRA 1986, which amended the ADEA and ERISA, prohibits Lockheed from using an employee's age at hire as a factor to reduce the employee's pension benefit accrual at retirement. AARP submits that the Ninth Circuit reached the correct results in ruling for Spink on both claims.

ERISA establishes specific rules to protect the integrity and security of pension plans to insure that plan monies are used exclusively for the purpose of providing benefits to employees. When Lockheed used pension funds to purchase releases from its employees to prevent lawsuits against Lockheed as an employer, Lockheed ran afoul of the *per se* prohibition against a party in interest's use of plan assets. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

Lockheed and its *amici* proffer strained readings of ERISA to obfuscate the clarity of its actions. Behind the smoke and mirrors of Lockheed's various arguments is the fact that Lockheed is on all sides of the prohibited transaction, as a plan sponsor, as a named fiduciary in the plan itself, and as a party in interest that uses plan assets and receives a tangible benefit as the employer released of all liabilities from employees who sign waivers. Quite simply, Lockheed improperly used plan assets and in so doing violated ERISA § 406(a)(1)(D), 29 U.S.C. 1106(a)(1)(D).

The second question before the Court focuses on the construction of OBRA 1986. Congress enacted OBRA to prohibit pension plans from using age as a factor to reduce or deny pension benefits to older employees. AARP submits that Lockheed violated OBRA §§ 9201 and 9202 by using Spink's age at hire to deny him credited service which reduced his final benefit accrual at retirement. Because in a defined benefit plan the employee's final benefit accrual does not become fixed until retirement, OBRA §§ 9201 and 9202 require employers to provide service credit for years of service prior to OBRA's effective date for any employee with one hour of service after OBRA took effect.

The plain language, legislative history, and purpose of OBRA §§ 9201 and 9202 refute Lockheed's tortuous reading of the statute. OBRA §§ 9201 and 9202 apply expressly to "employees" and contain absolutely no language restricting their prohibitions to participants. OBRA mandates full service credit that cannot be reduced because of age.

The real issue is not whether OBRA operates prospectively

or retroactively. Behind Lockheed's diversionary emphasis on retroactivity is the fact that Lockheed amended its plan in 1990 to deny credited service to employees like Spink because of their age at hire. OBRA did not require this plan amendment. OBRA did not force Lockheed to disregard Spink's pre-participation years of service. Lockheed's action in 1990 constitutes a separate and distinct act of discrimination that violates OBRA, regardless of ERISA's pre-1986 language which permitted plans to exclude certain older employees.

For the foregoing reasons, AARP submits that the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I. THE OLDER WORKERS BENEFIT PROTECTION ACT DOES NOT SANCTION AN EMPLOYER'S USE OF PENSION PLAN ASSETS TO PURCHASE RELEASES OF POTENTIAL CLAIMS FROM EMPLOYEES.

This case first presents the simple and clear cut issue of the legality of an employer's use of pension plan assets to purchase litigation releases from employees. It is not about whether employers may generally provide enhanced pension benefits to entice employees to leave the company early. It is not about whether employers may generally use releases to prevent lawsuits.[1/] It is about who pays for the release -- the company that is being released from potential liability, or a pension plan whose assets are not to be used "by or for the benefit of" the company. ERISA § 406(a)(1)(d), 29 U.S.C. § 1106 (a)(1)(D).

Thus, it is immaterial to resolving the issues in this case that many employers have been offering exit or early retirement incentives to their employees for the past 15 years. It is immaterial that some employers use releases in such programs to prevent lawsuits against the company. The statistics about the incidence of early retirement incentive programs and references concerning the use of releases relied on by Lockheed and its *amici* say nothing about whether the enhanced benefits given in exchange for the releases were paid by the employer or the plan.

Lockheed and its *amici* suggest that by enacting the Older Workers Benefit Protection Act (OWBPA),[2/] which defines the circumstances under which exit incentives and releases are prohibited by the ADEA, one can infer that Congress assumed the practice in this case would be lawful under ERISA. This is preposterous.

The OWBPA does not provide any intimation of Congress' views about plans' compliance with ERISA's provisions. Indeed,

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[1/] While most employers do not seek releases of employment claims from employees who have been downsized or individually discharged, *see* General Accounting Office, *Use of Waivers By Large Companies Offering Exit Incentives to Employees*, GAO/HARD 89-87 at 4-5 (1989), other employers often use broad general releases to prevent a plethora of claims that could be based on state or federal laws. However, an employer could not, and likely would not, impose releases on a protected class of employees (e.g., just women or just older employees) or require release of only a specific statutory claim (e.g., Title VII or ADEA), in exchange for enhanced benefits or other consideration, because the employer would be "doling out a benefit in a discriminatory fashion." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

For example, if an employer "required terminated employees to give up only ADEA claims to obtain the enhanced benefits, older employees but not younger employees would be forced to give up something of value". . . and the employer "would have treated older workers differently than younger workers." *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 723, 725 (3d Cir. 1995).

[2/] Pub. L. 101-433, 104 Stat. 978, 983 (1990).

Congress recognized in passing the OWBPA that determining compliance with ERISA and compliance with the ADEA were separate and distinct inquiries. "A practice can be perfectly permissible under ERISA and the code and at the same time can be discriminatory under our civil rights laws." STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, 102d Cong., 1st Sess., LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT 18 (Comm. Print 1991)(OWBPA LEGISLATIVE HISTORY). Conversely, as this Court held in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), a practice may violate ERISA but not the ADEA. Apart from OBRA §§ 9201 and 9202, the ADEA and ERISA establish substantially different obligations for employers in their treatment of employees.

Moreover, the OWBPA does not constitute a congressional endorsement of employers' use of exit incentive programs or releases. To the contrary, the OWBPA was enacted primarily to protect older employees because employers were denying them benefits based on age and secondarily to prevent employer abuses in the use of releases. The OWBPA does not protect employers or legitimize employer practices.

Congress enacted the OWBPA "to make unmistakably clear that the ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits." OWBPA LEGISLATIVE HISTORY at 20.[3] Title I of the OWBPA sets forth the prohibitions that prevent employers from denying or reducing benefits based on age and provides for narrow affirmative defenses if the claims involve certain types of benefit plans, such as early retirement incentives. *See, e.g.*, 29 U.S.C. §§ 623(f)(2)(b)(i) & (ii). Title II of the OWBPA, which regulates releases of ADEA claims, was later added to prevent employer

[3] OBRA and OWBPA clearly establish that employee benefit plans must comply with the ADEA, contrary to the reasoning and holding of *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989). *See* H.R. REP. NO. 99-1012, 99th Cong., 2d Sess. 379 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4019, 4024; OWBPA Legislative History, at 3 expressly overruling *Betts*.

abuses in releases by setting forth minimum standards that an employer must meet for a release to be enforceable under the ADEA. It is simply revisionist history to infer that Congress sought to encourage the use of releases in exit incentive programs merely because these two bills were joined for purposes of passage.

II. LOCKHEED VIOLATED ERISA § 406(A)(1)(D) BY USING PLAN ASSETS TO PURCHASE RELEASES OF POTENTIAL CLAIMS FROM EMPLOYEES.[4]

A. ERISA § 406(A)(1)(D) Is Violated When a Party in Interest Uses Plan Assets or Receives a Benefit From Plan Assets.

When Congress enacted ERISA, it understood that employees provide labor to an employer in exchange for a total compensation package, which may or may not include pension benefits. The value that an employer receives in this exchange

[4] One of the more hotly contested issues before the Court appears to be the scope of the Court's grant of *certiorari*. *Certiorari* was granted on the narrow issue of whether a plan sponsor may be held liable for a breach of fiduciary duty under ERISA when it amends the terms of the pension plan. However, Lockheed and *amicus* Chamber of Commerce attempt to expand the scope of the question upon which *certiorari* was granted. *Compare* Question 1 in the **Questions Presented** in PETITIONER'S BRIEF at p. i, and AMICUS CHAMBER OF COMMERCE'S BRIEF at p. i *with* **Questions Presented** in PETITION FOR WRIT OF CERTIORARI. *See also* BRIEF OF AMICUS UNITED STATES at n. 2. SUP. CT. R. 14.1(a); *Caspari v. Bohlen*, 114 S.Ct. 948, 952 (1994) ("We have consistently declined to consider issues not raised in the petition for . . . *certiorari* . . . . Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.").

is the ability to operate its business with the employees' labor.[5] An early retirement incentive program provides the employer with the value of reducing its workforce. Payment of enhanced pension benefits to entice employees to leave is permissible as part of the employment paradigm. However, an employee's release of employment claims is an additional and distinct benefit that it is not inherent in the employee's departure. Thus, if the employer wants a release of such claims, it can provide additional consideration from its corporate funds. The only issue here is who can legally pay for the releases -- the employer or the plan.

In ERISA, Congress crafted elaborate provisions for the regulation of pension plans, including fiduciary standards of care for plan fiduciaries. Title I of ERISA, 29 U.S.C. §§ 1001-1114; *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 732 (1985). Because Congress found that certain transactions automatically breached these standards, Congress made such transactions *per se* violations of ERISA, regardless of the good faith of the involved parties and the reasonableness or fairness of the transaction, in order to protect the financial integrity of pension plans and to ensure assets will be available to pay benefits. ERISA § 406, 29 U.S.C. § 1106; *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1213 (2d Cir. 1987); *Donovan v. Mazzola*, 716 F.2d 1226, 1237-28 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). Accordingly, ERISA § 406(a)(1)(D) absolutely prohibits a party in interest from directly or indirectly using any plan assets, regardless of the

[5] Within this employment paradigm, however, an employee is not free to negotiate away statutory employment rights in order to receive more compensation. *See Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (statutory protections cannot be waived).

amount.[6] It also unequivocally prohibits a transaction involving plan assets which provides any benefit to a party in interest. Finally, it totally prohibits a transfer of plan assets to a party in interest.

In short, Lockheed has violated two of the prohibitions of ERISA § 406(a)(1)(D) by its use of plan assets and by its receipt of a benefit from the use of plan assets. Lockheed conditioned its provision of enhanced pension benefits on an employee's execution of a waiver of all employment claims against it. In other words, Lockheed, a party in interest,[7] clearly used plan assets (enhanced pension benefits) - a use that violates ERISA § 406(a)(1)(D). *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983).

Undeniably Lockheed also received a benefit from this use of plan assets -- an employee's release of potential employment claims for receipt of enhanced pension benefits. Such a benefit is not only more than incidental, it is real, significant and quantifiable. Liability for employment claims can cost employers millions of dollars.[8]

[6] ERISA § 406(a)(1)(D) states that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D). The prohibition is absolute, barring any applicable statutory or administrative exemptions. ERISA §§ 408(a) & (b), 29 U.S.C. §§ 1108(a) & (b).

[7] No one disputes that Lockheed is a party in interest. *See* ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C).

[8] *E.g.*, *Hawkins v. Merchants National Bank*, No. 92-1876 (E.D. Cal. Oct. 13, 1995), *reported in* 22 (BNA) Pension & Benefits Reporter No. 44, at p. 2443 (Nov. 6, 1995) [$1.4 million award for age and sex discrimination claims]; *Harnett v. CSA Financial*
(continued...)

This is a transaction conducted with plan assets for the benefit of Lockheed, a party in interest, and clearly violates ERISA § 406(a)(1)(D).

Unquestionably, this is a strict reading of ERISA § 406(a)(1)(D). Some of Lockheed's *amici* suggest that such a reading would prohibit all benefit payments because employers receive a benefit from such payments. These *amici* conveniently ignore ERISA and the employment paradigm upon which it is based.[9]

To read ERISA § 406(a)(1)(D) as prohibiting benefit payments ignores the language, structure and purposes of the statute. *Cf. Varity Corp. v. Howe*, 1996 U.S. LEXIS 1954, *14-15 (March 19, 1996) (in order to interpret ERISA's fiduciary duties, one must look at the language of the statute, its structure and its purposes). The general fiduciary standards state that the fiduciary must discharge his or her duties for the exclusive purpose of providing benefits to participants. ERISA § 404(a)(1)(i), 29 U.S.C. § 1104(a)(1)(i). ERISA's structure has numerous provisions governing when and how benefits will be accrued and paid to participants. *E.g.*, ERISA §§ 105, 203, 204, 205 & 206, 29 U.S.C. §§ 1025, 1053, 1054, 1055 & 1056.

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[8](...continued)
Corp., No. 94-3252-C (Mass. Sup. Ct. Sept. 27, 1995), *reported in* (BNA) DAILY LABOR REPORTER No. 197, at A-5 (10/12/95) [$1.2 million award for age discrimination claims]; *Simpson v. Ernst & Young*, No. 1-91-196 (D.C.S. Ohio May 12, 1994), *reported in* (BNA) DAILY LABOR REPORTER No. 92, at A-5 (5/16/94) [$3.7 million award for age discrimination claims]; *Mister v. Ill. Cent. Gulf Rr. Co.*, No. 81-3006 (D.C. S. Ill. August 5, 1993) [$10 million in settlement of race discrimination claims, plus award of $4.8 million in attorneys' fees and expenses).

[9] In contrast, Lockheed concedes that the prohibited transaction rules do not prevent a plan from paying benefits to eligible participants. BRIEF OF LOCKHEED at n. 11.

Finally, in its findings and declaration of policy, Congress wanted ERISA to protect the interests of participants by requiring plans to pay benefits to employees who had worked for significant periods of time. ERISA § 2(c), 29 U.S.C. § 1001(c). In 1986, Congress affirmed its initial findings and declarations by stating that it wanted ERISA to increase the likelihood that participants will receive their full benefits. ERISA § 2b(c)(3), 29 U.S.C. § 1001b(c)(3). Consequently, to read ERISA § 406(a)(1)(D) as prohibiting payment of benefits to participants would make a mockery of ERISA's language, structure and purposes.

Such a reading would also ignore the employment paradigm of which Congress and this Court is well aware. The value employers receive from establishing pension plans is the purchase of labor from employees with the employer's total compensation package. It is impossible to definitely determine what portion of the employee's labor, and hence the value to the employer, is attributable to the pension benefit alone. *Cf. International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 560 (1978) ("Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits. He surrenders his labor as a whole . . . "). The value an employer receives from these benefits flows from the employment paradigm, and is intangible and nonquantifiable, at best.

While Lockheed concedes that the prohibited transaction rules do not prevent a plan from paying benefits to eligible participants, BRIEF OF LOCKHEED at n. 11, Lockheed analyzes ERISA to permit a plan sponsor to establish any eligibility provisions for receipt of benefits, whether or not the provisions comport with ERISA's fiduciary requirements.[10] Under

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[10] Lockheed and *amicus* Chamber of Commerce attempt to distinguish between Parts 2 and 4 of ERISA's Title I, suggesting that Congress chose to regulate the settlor function solely through the rules of Part 2 concerning participation and vesting. BRIEF OF LOCKHEED at 13; BRIEF OF AMICUS CHAMBER OF COMMERCE at 14 -15. However, Part 4 concerning fiduciary responsibility also (continued...)

Lockheed's analysis a plan provision would not violate ERISA if, for example, a plan required a participant to pay the plan sponsor $1,000 in order to receive a benefit. Lockheed would argue that such payment is simply an eligibility requirement to receive a benefit.

This is a nonsensical reading of the statute. Clearly, such a payment would be a prohibited transaction. AARP fails to see the difference between paying $1,000 to the plan sponsor for a benefit and executing a waiver releasing claims against the employer which could cost the employee, and protect the employer from, millions of dollars in employment-related claims. Indeed, the receipt of plan benefits are contingent upon the signing of the waivers which relieve an employer for liability of violations of statutes that govern the workplace.[11] A release of employment claims does not encompass any part of the labor which the employer and employee contemplated would be purchased by the compensation package. Thus, the value of the waivers to Lockheed goes well beyond any benefit it receives under the employment paradigm. Accordingly, an employee's release of potential employment claims for receipt of enhanced pension benefits is a transaction with plan assets for the benefit of Lockheed, a party in interest, and violates ERISA § 406(a)(1)(D).

Although this is a strict reading of the prohibited

[10](...continued)
regulates the settlor function through its rules such as the requirement of written documents and a trust for the establishment of an employee benefit plan. ERISA §§ 402(a)(1) & 403(a), 29 U.S.C. §§ 1102(a)(1) & 1103(a).

[11] "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995).

transaction rules, Congress provided a mechanism to deal with the severity of these rules. To the extent that a fiduciary can meet the standards of ERISA § 408(a), an administrative exemption can be granted.[12] In this case, however, AARP submits that such an exemption can never be found to be in the interests of the participants and beneficiaries because of the significant cost imposed on participants in executing the waivers.

Accordingly, Lockheed's plan provision requiring that employees execute waivers releasing all employment-related claims against it in order to receive pension benefits is a prohibited transaction, and violates ERISA § 406(a)(1)(D).

B. Lockheed is a Fiduciary with Liability for the Prohibited Transaction.

1. Lockheed is a Named Fiduciary Under the Plan.

ERISA requires that a plan set forth named fiduciaries so that responsibility for managing and operating the plan and liability for its mismanagement are established with a degree of certainty. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). *See* H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075-78, 5081 n.3; 29 C.F.R. § 2509.75-5, FR-1. A named fiduciary has the authority to control and manage the operation and administration of the plan and must be named in the plan instrument. ERISA §§ 402(a)(1) & (2), 29 U.S.C. §§ 1102(a)(1) & (2).

The Lockheed pension plan explicitly identifies Lockheed Corporation not only as Plan Sponsor, but also as a named fiduciary, JA 45, that has "the authority and responsibility for the design of the Plan and Trust Agreement, including amendments of the Plan and Trust Agreement; . . . " JA 46. *See also* BRIEF

[12] The exemption must be administratively feasible, in the interests of the participants, and protective of the rights of the plan participants. ERISA § 408(a), 29 U.S.C. § 1108(a).

OF LOCKHEED at n. 7. For these reasons, Lockheed, by the express terms of its plan, is clearly a fiduciary under ERISA § 3(21) when it engages in plan design and amendment, and is liable for the prohibited transaction under ERISA § 406(a)(1)(D).

2. Lockheed Is a Fiduciary By Implementing The Waivers.

Alternatively, Lockheed is a fiduciary by its implementation of the waivers. *See Varity Corp. v. Howe*, 1996 U.S. LEXIS 1954, *22-23 (March 19, 1996) (fiduciary administration is to perform duties imposed, or exercise the powers conferred, by the trust documents including the implicit conferring of "such powers as are necessary or appropriate for the carrying out of the purposes of the trust"). By the express terms of the amendment, Lockheed was to draft the participant election form, notify participants of their termination date, notify the pension plan which participants had signed the waiver and draft the release itself. JA 50-51, 54-55. Accordingly, Lockheed clearly became a fiduciary by causing the plan to engage in the prohibited transaction through these administrative actions which the plan would normally perform, and is liable for the prohibited transaction. *See Varity Corp. v. Howe, supra.*

3. Lockheed is a Fiduciary Under ERISA § 3(21) By Amending the Plan.

When looking at the plan provision at issue, one thing is apparent: Lockheed is on all sides of the transaction. Lockheed is the plan sponsor, and it passed the plan provision. Lockheed appoints the Retirement Plan Committee comprised of Lockheed senior officers and employees. Lockheed is the party in interest in the transaction. Clearly, the only party to have complete control and discretion over this transaction is Lockheed.

Lockheed and its *amici* rely on this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. —, 115 S. Ct. 1223 (1995), for the proposition that a plan sponsor has the right to amend or terminate a plan. However, nothing in *Curtiss-Wright* suggests that a plan sponsor has an unfettered right to

amend a plan if the plan provision violates ERISA.

Indeed, such a statement would have been contrary to this Court's decision in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982), stating that "[t]he substantive terms . . . of employee benefit plans must comply with the detailed and comprehensive standards of ERISA." A holding that Lockheed is not responsible for the passage of this illegal amendment leads to the incongruous result that a plan sponsor can, without impunity, pass a plan provision which violates any part of Title I of ERISA, but the plan's implementation of the provision would violate ERISA. This holding would permit Lockheed to hide behind the plan settlor function to impose conditions that will benefit only itself, even though its fingerprints are all over the transaction. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075-78, 5081 n.3. The Ninth Circuit properly rejected this sophistry. JA 89.

Accordingly, AARP submits that a plan sponsor acts as a fiduciary when it passes a plan provision violating ERISA's rules because the provision involves the sponsor's exercise of discretionary authority or control respecting plan administration. 29 U.S.C. § 1002(21)(A). *Cf. ACTWU v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988)(settlor functions may constitute a viable claim in the context of fiduciary breaches).

III. OBRA 1986's BROAD PROHIBITION OF AGE DISCRIMINATION IN PENSION PLANS REQUIRES OLDER WORKERS WHO RETIRE AFTER JANUARY 1, 1988 TO RECEIVE PENSION CREDIT FOR ALL PRE-ACT YEARS OF SERVICE.

"[T]he overall objective of [OBRA's pension] provisions [is] to assure that employee benefit plans do not discriminate on the basis of age." H.R. REP. NO. 99-1012, 99th Cong., 2d Sess. 379

(1986), *reprinted in* 1986 U.S.C.C.A.N. 4019, 4024.[13] Prior to the enactment of OBRA 1986, two groups of older workers were discriminated against in pension plans. The first group -- employees who were hired within five years of their employer's normal retirement age -- were denied <u>any</u> pension credit for their years of service. The second group -- employees who continued to work past their employer's normal retirement age -- were denied <u>additional</u> pension credit after reaching their plan's normal retirement age. In both instances, the employees were denied pension credit for their years of service solely on account of their age. Congress enacted OBRA 1986 to eliminate <u>both</u> types of age discrimination.

The second issue before the Court involves Spink's claim that Lockheed violated OBRA 1986 by reducing his benefit accrual when he retired in 1990 based on a formula that used his age at hire to deny him credit for nine years of service. Specifically, Spink alleges violations of OBRA §§ 9201 and 9202, which amended the ADEA and ERISA to prohibit a reduction of the rate of an employee's benefit accrual because of age. OBRA § 9204(a)(1) applies these amendments to "employees who have 1 hour of service in any plan year" beginning on or after January 1, 1988. Since Spink had more than one hour of service after OBRA 1986 took effect, §§ 9201 and 9202 required Lockheed to credit all of his years of service in his final benefit accrual and prohibited it from using his age at hire to disregard years of service.

Lockheed points the Court to OBRA § 9203 which repealed ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2),[14] and

[13] OBRA 1986 amended the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and the Internal Revenue Code (IRC), 26 U.S.C. § 1 *et seq.*, to prohibit age discrimination in pension plans.

[14] Prior to being amended by OBRA 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986), ERISA § 202(a)(2) read:

(continued...)

added a new provision providing for delayed normal retirement dates to accommodate the initial participation of these older employees. Lockheed argues that OBRA § 9203 and its effective date provision, § 9204(b), which applies only to "service performed on or after January 1, 1988," permitted it to disregard Spink's pre-1988 service when calculating his final pension benefits.

AARP submits that the Ninth Circuit correctly held that the language, purpose, and legislative history of OBRA 1986 demonstrate that Congress clearly intended to prohibit employers from using age as a factor to reduce the pension benefits of any employee covered by OBRA 1986. However, AARP also maintains that the Ninth Circuit incorrectly concluded that OBRA 1986 operates retroactively based on this Court's analysis in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). Rather, as explained below, Lockheed engaged in new discriminatory acts subject to OBRA 1986 when it amended its plan in 1990 and denied credited service to Spink and other older employees who had been excluded from participation because of their age at hire.

[14](...continued)

> No pension plan may exclude from participation employees who have attained a specified age, "unless...such employees begin employment with the employer after they have attained a specified age, which is not more than five years before the normal retirement age under the plan.

29 U.S.C. § 1052(a)(2)(emphasis added). The ADEA did not contain a parallel provision allowing individuals to be excluded from pension plans based on their age at hire. OBRA § 9203 amended ERISA § 202(a)(2) to read: "No pension plan may exclude from participation employees who have attained a specified age.

A. The Plain Language, Purpose, and Legislative History of § 9204(a)(1) Demonstrate that Congress Clearly Intended Inclusion of Pre-1988 Years of Service in Determining Pension Accruals.

In § 9204(a)(1), Congress mandates that OBRA 1986's protection against age discrimination in the accrual of pension benefits applies to all "employees who have 1 hour of service in any plan year [beginning on or after January 1, 1988]." There are two significant features of this effective date provision. First, Congress chose to protect all "employees" with one hour of service, not a more restrictive class such as "participants" or "prior participants." Second, Congress did not include any language that would even suggest that it was limiting the years that may be considered when calculating an employee's final retirement benefit. The only limitation is on the class of individuals who may benefit from OBRA 1986's protection. And again, this class is defined very broadly -- any employee with at least one hour of service in a plan year beginning on or after January 1, 1988. As an employee who continued to work at least one hour into a 1988 plan year, Spink was among the group whom Congress intended to protect and to provide relief.

"In assessing the applicability of ERISA's provisions, it is important to recognize the Act's distinction between 'employees' and 'participants.'" *Stewart v. Nat'l Shopmen Pension Fund*, 563 F. Supp. 773, 777 (D.D.C. 1983), *rev'd on other grounds*, 735 F.2d 1552 (D.C. Cir. 1984). Congress does not use these two terms interchangeably. *Cohen v. Martin's*, 694 F.2d 296, 298 (2d Cir. 1982)("The vesting provisions speak of 'an employees right' to receive pension benefits. . . . Other sections of the statute extend their coverage to plan 'participants'. . . "). For example, ERISA § 204(b)(1)(G) prohibits reducing a "participant's accrued benefit" because of an increase in age or service. 29 U.S.C. § 1054(b)(1)(G)(emphasis added). However, §§ 9201 and 9202 prohibit age discrimination in calculating "an employee's benefit accrual." 29 U.S.C. §§ 623(j)(1)(A) and 1054(b)(1)(H)(i)(emphasis added). The selective use of the term "employee" in these sections and their effective date provision demonstrate Congress' clear intent that they apply broadly to

individuals like Spink who continued their employment into a plan year beginning on or after January 1, 1988. Had Congress intended to limit OBRA 1986's protections to those individuals who were "participants" prior to January 1, 1988, it could have done so. It did not. Instead, it chose to extend OBRA's protections to all "employees who have 1 hour of service in any plan year [beginning on or after January 1, 1988]." § 9204(a)(1) (emphasis added).

The second notable feature of OBRA § 9204(a)(1) is the absence of any language limiting its applicability to post-enactment service. Nothing in the language of § 9204(a)(1) even suggests that any years of service may be excluded from consideration when calculating an employee's final retirement benefit. In fact, the legislative history of OBRA 1986 establishes that Congress specifically rejected attempts to exclude service prior to OBRA's effective date.

An earlier version of OBRA 1986 had specifically provided that it would apply only to individuals employed after December 31, 1988 and only to accrual computation periods beginning after December 31, 1986. H.R. Rep. No. 99-1012, 99th Cong. 2d Sess. 377 (1986). The language Congress chose for this earlier version clearly excluded pre-enactment service. However, Congress rejected this proposal in conference. Congress understood the "appropriate and specific language" necessary to exclude pre-1988 service and chose not to include it. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.")

The Conference Committee instead drafted an effective date provision in OBRA § 9204(a)(1) that did not exclude from consideration any years of service for purposes of applying §§ 9201 and 9202. OBRA § 9204(a)(1) must, therefore, be read as requiring inclusion of all pre-1988 years of service when determining an employee's pension benefit pursuant to §§ 9201 and 9202.

Furthermore, when Congress intended to permit a limitation on service, it specified the parameters of such a limitation. OBRA § 9202(a)(1) provides that:

> a plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) . . . a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

100 Stat. 1975. (emphasis added) By expressly permitting this type of limitation on service and participation in § 9202(a)(1), it can be presumed that Congress did not intend to permit the exclusion of pre-OBRA service in §§ 9201 and 9202. *See Russello v. United States*, 464 U.S. at 23.

B. Interpreting OBRA § 9204(a)(1) To Include Pre-1988 Years Of Service Is Consistent With The Interpretation Of Similar Effective Date Language In Other Legislation Affecting Pension Benefits.

A review of other legislation affecting pension benefits illustrates that Congress uses language similar to that in OBRA § 9204(a)(1) when it intends plans to include pre-act years of service. Conversely, Congress is explicit when it wants to carve out or exclude specific years of service for determining an employee's benefit accruals or vested benefits.

Statutory language comparable to OBRA § 9204(a)(1) demonstrates the language Congress uses when it intends to include pre-effective date service in pension benefit calculations. Section 202 of the Retirement Equity Act, Pub. L. No. 88-397, 98 Stat. 1426 (1984), amended § 411 of the Internal Revenue Code to provide specifically that only years of service before age 18 (instead of age 22) could be disregarded when determining a participant's vested interest in his accrued benefits. Section 303(a)(1) of REA applied the amendments only to "participants who have at least 1 hour of service under the plan on or after the

first day of the first plan year to which the amendments made by this Act apply."

The temporal scope of REA's effective date language is strikingly similar to the language used in § 9204(a)(1) of OBRA 1986. The discussion of the REA amendment in the Senate Finance Committee Report makes clear that years of service completed after the employee attained age 18, but before the effective date of the REA amendments, must be counted when determining the employee's vested interest. REPORT OF THE FINANCE COMMITTEE OF THE U.S. SENATE ON THE RETIREMENT EQUITY ACT OF 1984, S. REP. NO. 98-575 at 8 (August 2, 1984), *reprinted in* 4 U.S.C.C.A.N. 2547, 2554 (1984). ("Under the bill, a plan is not permitted to ignore, for purposes of the minimum vesting requirements, an employee's years of service completed after the employee has attained age 18.")

Congress also used language parallel to OBRA § 9204(a)(1) in § 1113 of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, which prescribed minimum vesting standards for pension plans. Section 1113(e) stated that the amendments "apply to plan years beginning after December 31, 1988", § 1131(e)(1), but "not to any employee who does not have 1 hour of service in any plan year to which the amendments made by this section apply." § 1113(e)(3). The Conference Report on the Tax Reform Act made clear that the accelerated vesting schedules were to apply to the participant's entire accrued benefit, including benefits attributable to years of service completed prior to the effective date of December 31, 1988. 132 Cong. Rec. H7709 (daily ed. September 18, 1986)(emphasis added).

In contrast, Congress uses different effective date language when it intends pre-act service to be excluded. For example, § 240(c)(1)(C) of the Tax Equity and Fiscal Responsibility Act of 1982 spells out in detail the years of service excluded when computing the minimum benefits a participant is entitled to under the top-heavy rules of § 416 of the Code ("such year of service was completed in a plan year beginning before January 1, 1984."). Pub. L. No. 97-248, § 240(c)(1)(C), 96 Stat. 324 (1982).

When Congress amended § 410(a)(5) of the Code in REA, it also used language specifically excluding pre-effective date service:

> If, as of the day before the first day of the first plan year to which the amendments made by this Act apply, . . . section 410(a) or 411(a) of the Internal Revenue Code of 1954 (as in effect on the day before the date of enactment of this act) would not require service to be taken into account, nothing in the amendments made by . . . section 202 of this Act shall be construed as requiring such service to be taken into account under section . . . 410(a) or 411(a), as the case may be.

Retirement Equity Act, § 303(a)(2), Pub. L. No. 98-397, 98 Stat. 1426 (1984).

As the above comparison of effective date provisions makes clear, Congress explicitly carves out pre-effective date service in the calculation of pension benefits when that is its intent. Conversely, when Congress intends to recognize such service, it has used language identical to OBRA § 9204(a)(1). Because the Ninth Circuit's interpretation of § 9204(a)(1) supports Congress' intent, it should be affirmed.

C. Including Pre-OBRA Years of Service in a Final Benefit Accrual Does Not Cause the Statute to Have a "Retroactive Effect."

1. The "Events in Suit" – Namely Lockheed's 1990 Plan Amendment and the Calculation of Spink's Accrued Benefit – Occurred After the Effective Date of OBRA 1986.

The threshold inquiry for determining whether a statute operates retroactively as set forth by the Court in *Landgraf v. USI Film Products* is whether the "case implicates a federal statute enacted after the events in suit..." 114 S. Ct. 1483, 1505 (1994). "Whether a particular application is retroactive" will "depend

upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Republic National Bank of Miami v. United States*, 506 U.S. 80, 85 (1992) (Thomas, J. concurring), *quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 857, and n.3 (1990) (Scalia, J., concurring). Thus, the determination of the relevant "event" is critical to the Court's examination of the proper reach of the statute in issue.

The "events" challenged by Spink are Lockheed's 1990 plan amendment and the calculation of his pension benefits at the time of his retirement in 1990. In contrast, Lockheed would pinpoint the relevant "event" as 1979, when Spink was excluded from participating in the plan because he was over age 60 when hired. But Spink's OBRA claim does not arise from Lockheed's action in 1979. Rather, Spink claims that Lockheed's subsequent actions in 1990 constituted new and independent grounds for the OBRA 1986 violation.

Lockheed amended its pension plan in 1990 to expressly deny credited service for "pre-Member service" to those employees who had been hired at age 60 or older prior to 1988.[15] This is the amendment and the denial of benefits based on age that Spink contends violates OBRA 1986. Nothing in OBRA 1986 required Lockheed to exclude pre-participation service from credited service for any employees in the calculation of their benefit accrual. Indeed, Lockheed's 1990 early retirement incentive provided credited service for other employees for years in which they were not participants.

In contrast, Lockheed chose to treat certain older employees differently based solely on their age at hire. Lockheed's actions in 1990 violated the ADEA. As this Court explained in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985):

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[15] The 1990 amendment to the Lockheed Pension Plan at Section 4.04(C)(2) provides: "An Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988... shall not receive Credited Service for his pre-Member service."

> [a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free. . . not to provide the benefit at all.

quoting Hishon v. King & Spalding, 467 U.S. 69, 75 (1984).

The "events in suit" here are Spink's claim that Lockheed violated the ADEA's and ERISA's prohibitions against reducing benefit accruals based on age as amended by OBRA 1986. In a claim that a denial of benefits discriminates under the ADEA or violates ERISA, the relevant "event" is the employer's denial of benefits. Indeed, a claim for the unlawful denial of benefits under the ADEA or ERISA does not even accrue until the request for benefits is formally made and finally denied. *See Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 451 (6th Cir. 1992) (ERISA); *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989) (ERISA); *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 212 (4th Cir. 1982)(ADEA claim of benefit discrimination accrues only after the claimant's final status and benefit entitlement is determined at retirement); *Equal Employment Opportunity Commission v. Westinghouse Elec. Corp.*, 725 F.2d 211, 219 (3d Cir. 1983)(a denial of benefits does not occur until the employee is eligible to apply and until the claim is denied).

Here, the critical "events" -- the plan amendment denying credited service to Spink and the calculation of his final benefit accrual -- both occurred in 1990 --- four years after OBRA 1986 was enacted and two years after it became effective.

The mere fact that Lockheed's 1990 actions may have also continued or incorporated previous discrimination, even previously "lawful" discrimination, does not insulate those 1990 actions from a challenge that they violate OBRA. A current benefit structure, like a present salary structure, is illegal if it continues a pre-act discriminatory structure. *See Bazemore v. Friday*, 478 U.S. 385 (1986).

The Court's analysis of discrimination in a salary structure in *Bazemore* aptly applies to discrimination in a benefits formula.

In *Bazemore*, plaintiff sued under Title VII to eliminate salary disparities between blacks and whites that had stemmed from a segregated work force that existed prior to the passage of Title VII. The Court "focuse[d] on the present salary structure," ... finding it "illegal if it is a mere continuation of the pre-1965 discriminatory pay structure." 478 U.S. at 397, n.6. Similarly here, Lockheed's 1990 plan amendment continued a discriminatory plan structure that singled out a certain group of older employees for differential treatment and less benefits.[16]

Another example also illustrates the distinction between a focus on current challenging discrimination that incorporates previously lawful actions and a challenge to pre-act discrimination. For years prior to the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000(e)(k) many employers forced female employees to take extended leaves of absence during and after their pregnancies. Many employers also denied service credit to these female employees for the periods of forced leave. In *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), plaintiff challenged her employer's denial of an Early Retirement Opportunity (ERO) benefit, because as a result of a forced pregnancy leave taken in 1972, she was days short of the eligible service needed for the ERO. She argued that Pacific Bell's reliance on a historical leave policy constituted a new act of discrimination in the administration of the ERO and the Ninth Circuit agreed. 940 F.2d at 1327.

Similarly, an examination of the current application of a benefit structure that relied on past events was the focal point in *Puckett v. United Air Lines, Inc.*, 705 F. Supp. 422 (N.D. Ill. 1989). In *Puckett*, the court thoroughly examined the language and purposes of OBRA's 1986 pension accrual and effective date provisions, §§ 9201, 9202 & 9204(a)(1). The court held that

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[16] In contrast to *Florida v. Long*, 487 U.S. 223 (1988), where the Court distinguished the continuing violation theory in *Bazemore* from the "payments of benefits based on a retirement that has already occurred," 487 U.S. 223 at 238, the discriminatory acts challenged here are the plan amendment and the denial of benefits upon retirement.

"[A]n employee's benefit amount is calculated with the formula existing at the time of the employee's retirement, not with a formula that existed at the beginning of or during the accrual period." *Id.* at 423. The court reasoned that merely because the benefits "formula includes variables dependent on past events" does not make OBRA 1986 retroactive. 705 F. Supp. at 424. Thus, the court concluded that:

> employees who retire after the effective date of OBRA must receive credit for all years of service, including those prior to the effective date, in determining their benefit...

Id.

2. The "Events in Suit" were Not Completed Until 1990 When Spink Retired.

Under *Landgraf*, if a statute "attaches new legal consequences to events completed before its enactment," *Landgraf*, 114 S. Ct. at 1499, then it operates retroactively. Lockheed's view of a "retroactive effect" misconstrues several fundamental principles about the operation of defined benefit plans. The events determining Spink's final benefit accrual were not completed until he retired in 1990, four years after OBRA was enacted.

OBRA 1986's grant of credit for pre-1988 service to those employees who remain employed beyond January 1, 1988 is consistent with the standard operation of defined benefit plans. A defined benefit plan provides a retirement benefit to employees typically based on a formula consisting of total years of service and final salary. The two events that compose the retirement benefit in a defined benefit plan do not become fixed until the employee retires. *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 636 n.1 (1990).

During the course of an employee's career, his expectation of the benefit he will receive, and the employer's expectation of the benefit it will pay, change dramatically as their situations

change. Neither the employee's nor the employer's expectations about the retirement benefit become fixed by the employee's status at hire, although that is precisely what Lockheed seeks to do here.

For example, suppose the employee in question had started with a company as a secretary making $15,000 a year. At the time of hire, the employer and employee had an expectation of a fairly limited pension benefit the secretary would receive at retirement based on her low salary. But suppose the secretary rose through the ranks of the company to become a vice-president making $100,000 a year. Her final benefit accrual, based on years of service and her final years' salary (typically the highest or last five years), result in a far greater pension and one that could not have been expected or predicted based on her status at hire. The illustration demonstrates that no employer can reasonably fix its expectations about the ultimate benefit to be paid an employee based on the employee's status, salary, or position at hire. Numerous intervening events can dramatically change the picture.

Other changes, such as intervening laws, swings in the market, and changes in actuarial assumptions can also significantly change the employer's ongoing funding of a defined benefit plan and the benefits ultimately paid to employees upon retirement.[17] When an employee retires, he is paid a benefit in accordance with the benefit accrual formula and the legal requirements in effect at the time of his retirement, even if he had previously accrued benefits on a different basis under different plan formulas. *See Puckett v. United Air Lines, Inc.*, 705 F. Supp. at 433.

The events that determined Spink's benefit accrual were not **completed** until 1990. Thus, OBRA 1986 does not operate retroactively.

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[17] *See* N. Stein, *Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer*, 5 AM. J. TAX POLICY 117, 121-22, and n. 19 (1986).

D. Granting Spink and Similarly Situated Individuals Credit for Their Pre-1988 Service Will Not Cripple Private Pension Plans.

Lockheed and its *amici* attempt to persuade this Court that requiring Lockheed and other employers to give older workers credit for their pre-1988 service, will have an immediate and devastating effect on employers and their retirement plans.[18] There is simply no evidence supporting this allegation. Granting employees, who had previously been excluded from participating in their employer's pension plan based on their age, credit for their pre-1988 service will not significantly impact pension plans.

The class of affected individuals is exceedingly small and well-defined. The only individuals impacted are those individuals (a) who began working for an employer before the first day of the pension plan year beginning sometime in 1988; (b) who at the time they were hired were within five years of normal retirement age – usually age 60;[19] (c) who continued to work at least one day into the 1988 plan year; (d) whose employer had a pension plan which excluded such workers from plan participation;[20] and (e) whose pension plan refused to include pre-1988 service in calculating final benefit accruals under the plan.

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[18] Because Lockheed's plan is substantially overfunded, JA 10, it is unlikely that any additional contribution would be necessary to pay for the benefit accruals OBRA mandates.

[19] This factor alone significantly reduces the scope of the affected group. Employees age 60 and older face incredible obstacles in finding employment. Department of Labor, LABOR MARKET PROBLEMS OF OLDER WORKERS 59 (1989).

[20] The "Age 60 Exclusion" "was not a majority practice" of defined benefit plans. *Spink v. Lockheed, Part II: The OBRA 1986 Interpretation*, 4 ERISA LITIGATION REPORTER 22 (1995). The Chamber of Commerce of the United States of America, as *amici* for Lockheed, estimates that only 37 percent of defined benefit plans took advantage of the exclusion. BRIEF at 28.

In enacting OBRA 1986, Congress was aware of the potential cost plans would incur by including pre-OBRA service for the much larger group of employees who worked beyond normal retirement age. In a comprehensive study of the cost of requiring employers to continue pension contributions to this larger group, of which Spink and employees are a small subset, Congress found that it "would not significantly affect total U.S. pension costs.[21] Contributions to pension funds would increase by less than 1 percent. . ." STAFF OF SENATE SPECIAL COMMITTEE ON AGING, 99th Cong., 2d Sess., THE COST OF MANDATING PENSION ACCRUALS FOR OLDER WORKERS iv (Comm. Print 1986). By enacting OBRA 1986 with knowledge of its potential financial impact, Congress demonstrated its belief that the benefits associated with eliminating age discrimination in pension plans outweighed the minimal cost associated with doing so.

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[21] While the impact on plans would be insignificant, requiring credit for all years of service would provide the small group of affected individuals substantially more valuable retirement benefits.

CONCLUSION

For the foregoing reasons, AARP respectfully submits that the decision of the Ninth Circuit be affirmed.

Respectfully submitted,

Cathy Ventrell-Monsees
Cathy Ventrell-Monsees
Counsel of Record
Mary Ellen Signorille
Laurie McCann
AMERICAN ASSOCIATION
OF RETIRED PERSONS
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*

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